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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

IN RE COLLEGE ATHLETE NIL LITIGATION

Case No. 4:20-cv-03919 CW

PLAINTIFFS' OPPOSITION TO MOTION FOR ADMINISTRATIVE RELIEF FOR LEAVE TO CONDUCT A SUPPLEMENTAL DEPOSITION OF DR. DANIEL RASCHER

Judge: Hon. Claudia Wilken

Defendants' request for a second deposition of Plaintiffs' class certification economic expert, Dr. Daniel Rascher, should be denied. Consistent with the Federal Rules of Civil Procedure—and this Court's scheduling order—leave of the court is required to conduct a second deposition of Plaintiffs' class certification experts. Courts generally will not require an additional deposition"[a]bsent a showing of good cause."[1] Here, as courts have found in other cases, there is no "good cause" because Dr. Rascher's reply report covers the same subject matter as the opening report on which he was already deposed, contains no new opinions, and properly rebuts arguments Defendants and their class certification experts raised in their opposition filings.[2] Defendants' own motion supports this—in multiple places, it cites directly to portions of Dr. Tucker's report to which Dr. Rascher has responded.[3] Defendants' cited case law also supports this—in *In re High Tech Emp. Antitrust Litig.*, 2014 WL 1351040 (N.D. Cal. Apr. 4, 2014), the case Defendants rely on for the standard for the proper scope of a rebuttal report, the court denied a motion to strike and request for a sur-reply because plaintiffs' expert in his rebuttal report was "entitled, in direct response to [defendants' expert], to explain in detail greater than [his] opening report." *Id.* at *13 & n.29. Dr. Rascher's reply report contains only such proper rebuttal.

Defendants have had their opportunity at class certification to depose Dr. Rascher and to make their opposition arguments; Plaintiffs have had their last word in reply on their class certification motion. If Defendant take an additional deposition now, they are likely doing so in order to subsequently move for additional briefing and/or a new expert report, to which Plaintiffs as the moving party would need to respond. Indeed, when Plaintiffs' counsel posed this question to defense

[1] *Presidio Components, Inc. v. Am. Tech. Ceramics Corp.*, 2009 WL 861733 at *4 (S.D. Cal. Mar. 25, 2009) (citing Fed. R. Civ. P. 30(a)(2(A)(ii)); *see also ProconGPS v. Skypatrol, LLC*, 2013 WL 11261327, at *1 (N.D. Cal. May 13, 2013) (denying defendants' request for two depositions of plaintiff's expert).

[2] *See Presidio*, 2009 WL 861733, at *4-5; *In re High Tech Emp. Antitrust Litig.*, 2014 WL 1351040, at *13 (N.D. Cal. Apr. 4, 2014), The following class certification expert reports of Dr. Daniel Racher are referred to in this brief: Rascher Class Cert. Report, ECF No. 209-2 ("Rasher Rep.") (Sealed) and Rascher Class Cert. Reply Report, ECF No. 290-2 ("Rascher Reply") (Sealed).

[3] *See, e.g.*, Mot. for Administrative Relief for Leave to Conduct a Suppl. Dep. of Daniel Rasher at 4:13-14, 4:28, 5:10-12, ECF No. 303 ("Mot.") (citing Tucker Class Cert. Opp'n Report, ECF No. 254-1 ("Tucker Rep.") (Sealed)).

counsel during a meet-and-confer call, Defendants conceded that *for now* they only sought a deposition, but they would not rule out later asking for further briefing and/or a new expert report. Berman Decl. ¶ 3. Given that the class certification hearing is set for September 21, *any* further briefing or reports would almost certainly disrupt a case schedule that has already been extended several times (further prejudicing and delaying relief for Plaintiffs).

Moreover, a second deposition would be particularly unjustified here because Defendants *will* have another chance to depose Dr. Rascher—after his merits expert report. That distinguishes this case from *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 2014 WL 12639392 (N.D. Cal. Dec. 10, 2014), relied on by Defendants, where the special master ordered a new deposition after a *merits* rebuttal report, finding that this would "increase the chances of an efficient trial." *Id.* at *2. That is not the case here. Indeed, Defendants do not cite a single case where a court ordered a new deposition after a class certification rebuttal expert report. It is most efficient for Defendants to ask questions about these issues in a single additional deposition, after Dr. Rascher files his merits report.

As described below, Defendants identify nothing in Dr. Rascher's reply report that isn't proper rebuttal or otherwise warrants a second, supplemental deposition. Their motion should be denied.

Substitution effects. Dr. Rascher addresses the potential substitution effects of college athletes choosing to stay in school rather than turn professional if they received more money in the but-for world. Rascher Rep. at 117-121. In her report, Dr. Tucker dedicated close to sixty pages to not only discussing this potential substitution effect, but also introducing a different one (as Defendants concede—*see* Mot. at 4): her claim that BNIL money would have caused athletes who chose non-Power 5 schools to choose Power 5 schools in the but-for world, causing "ripple" substitution effects. *E.g.*, Tucker Rep. at 26 (summarizing argument). It was proper rebuttal for Dr. Rascher to respond directly to Dr. Tucker's *new* argument, including to critique how Dr. Tucker used the 247Sports scholarship data she relied on in her report. For example, Dr. Rascher's rebuttal pointed out the flaw in her assumption that every scholarship reported in the 247Sports data was actually available for each position on a team, with Dr. Rascher explaining that Dr. Tucker ignored

"position availability" information on the website, which is just a succinct way to describe a consideration Dr. Tucker overlooked, not a new "variable," as Defendants claim. *See* Rascher Reply at 99-100; *compare* Mot. at 4:21. While Defendants cite this as a justification to pursue another deposition, it is a direct, proper rebuttal to Dr. Tucker's analysis. In addition, Dr. Rascher's reference to "revealed preference" in a footnote (at 95 n.240) does not transform his rebuttal into a new opinion.

Lost opportunity as economic injury. Defendants also argue they should get a second deposition because in his reply report, Dr. Rascher supposedly introduces new and extensive analysis supporting the idea that lost opportunity constitutes economic injury. Specifically, they argue that he discussed the issue only "in passing" in his opening report and inclusion of terms such "loss of market information" in his reply introduced "new economic concepts." Mot. at 3. To the contrary, this issue and these concepts were discussed in several places in his opening report (Defendants cite only one page), and Defendants had the opportunity to question Dr. Rascher about them at his first deposition.[4] Moreover, "expected value" is used in response to Dr. Tucker's critique that class members lacked a non-*de minimis* expectation of economic value from NIL in the but-for world. Rascher Reply at 15 (citing Tucker). Specifically, it frames the arguments and examples of large-scale NIL deals *from the opening report*, which indicate (among other things) that absent the challenged NIL rules, athletes had more than a *de minimis* expectation for economic compensation for the use of their NILs. *See* Rascher Reply at 15-17 (citing deals and arguments from opening report).

[4] *See, e.g.*, Rascher Rep. at 19-20 ("Importantly, this lost opportunity to participate in a competitive market to seek NIL transactions from third parties caused a common economic injury to each class member, as members of the proposed classes were deprived of this competitive market opportunity."); 48 ("As the Court has already observed: the 'loss of an opportunity may constitute injury, even though it is not certain that any benefit would have been realized if the opportunity had been accorded.' *This lost opportunity to participate in a competitive market by itself adversely affects all class members*." (emphasis added)); 101 ("The NIL marketplace itself will also continue to grow as *transactions inform market participants* how best to match the NIL supply with demand free of the past restraints previously imposed on them." (emphasis added)).

Discussion of conference-level BNIL payments. Despite questioning Dr. Rascher at length about conference-level payments in his first deposition (Berman Decl., Ex. 1 (Rascher Dep.) at 14-17), Defendants contend they need a new deposition on this topic because after his rationale was supposedly debunked by Dr. Tucker, he "pivots" to arguing that these payments promote "'efficiency'" as a part of a "'competitive economic equilibrium'" and would be "'cost-effective.'" Mot. at 5. This is an odd argument because, among other things, in his opening report Dr. Rascher described conference-level payments as "rationally chosen," adding the "most value," and "limit[ing] transaction costs." Rascher Rep. at 75-77. Dr. Rascher's reply arguments are perfectly in line with his opening report opinion and arguments about conference-level BNIL payments, and they are also directly responsive to Dr. Tucker's argument that he fails to model a credible competitive economic response. *See* Rascher Reply at 47-51 (responding to Tucker Rep. at 126-29).

Discussion of model for third-party NIL injury and damages. In his opening report, Dr. Rascher thoroughly described his class-wide damages model for estimating lost third-party NIL opportunities, and how particular data could be used to make adjustments to his model at the merits stage, including, contrary to Defendants' argument, for number of football "snaps" (a measure of event participation) and "transfers." Rascher Rep. at 94-117. That was more than enough to satisfy the class certification requirement that a damages model be "consistent with [plaintiffs'] liability case" and "capable of measurement [of damages] on a classwide basis." *Comcast Corp. v. Behrend*, 569 U.S. 27, 34-35 (2013). In his rebuttal, Dr. Rascher refuted Dr. Tucker's arguments that his methodology and adjustments were "vague" and "insufficient" (Tucker Rep. at 189-90), by implementing the adjustments for a subset of class members, including showing how data could be used on the merits to test if adjustments are necessary for women's gymnastics, baseball, and softball. Rascher Reply at 69-82. This responsive testimony, consistent with his initial opinion on the same subject matter, was proper rebuttal. *See High Tech*, 2014 WL 1351040, at *13; *Presidio*, 2009 WL 861733, at *5.

Dr. Rascher's analysis of institution's athletic revenues. Defendants complain that Dr. Rascher "defend[ed] his BNIL methodology with a new analysis of institutions' athletic revenues."

Mot. at 5. But, as Defendants apparently concede (*id.*, citing Tucker), Dr. Rascher was again responding directly to Dr. Tucker's criticism: she speculates that some sports might be at risk due to the financial impacts of BNIL payments under Dr. Rascher's model. Rascher Reply at 22-23. Dr. Rascher was not required to anticipate and preemptively respond to every narrow criticism of his model in his opening report. *See High Tech*, 2014 WL 1351040, at *13 (so holding).

* * *

Because Dr. Rascher has offered no new opinions in his class certification reply report, but rather only proper rebuttal in response to Dr. Tucker's arguments, Defendants' request for a second, supplemental deposition of Dr. Rascher should be denied. *See Presidio*, 2009 WL 861733, at *4-5; *see also High Tech*, 2014 WL 135040, at *9-13 (describing proper scope of rebuttal testimony under Rule 26). Moreover, in the absence of improper rebuttal testimony, under the facts of this case—including where Plaintiffs have the burden of proof on their class certification motion and Defendants will have a chance to depose Dr. Rascher again on the merits before trial—it would be an unfair and unjustified expense and burden to permit a second, supplemental class certification deposition, which could disrupt the already elongated class certification schedule in this case, further prejudicing Plaintiffs.

In the alternative, if the Court permits a supplemental deposition, the Court should limit the deposition to two hours and restrict the scope to only those specific areas where the Court finds that Dr. Rascher's reply report went beyond the scope of proper rebuttal. To prevent further disruption to the schedule, including the class certification hearing, the Court should also limit Defendants to the relief requested in their motion and order that no additional briefing or expert reports be permitted at the class certification stage.

Dated: August 14, 2023

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ATTESTATION PURSUANT TO CIVIL LOCAL RULE 5-1(i)(3)

Pursuant to Civil Local Rule 5-1(i)(3), the filer of this document attests that concurrence in the filing of this document has been obtained from the signatories above.

Dated this 14th day of August 2023.

/s/ Steve W. Berman
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